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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

ROSALINDA LORONA, Petitioner, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2015, Union. DYCORA TRANSITIONAL HEALTH – FRESNO, Employer	No. 32-RD-213130 **UNION'S POST-HEARING BRIEF REGARDING OBJECTIONS TO THE ELECTION**

I. INTRODUCTION

Service Employees International Union, Local 2015 ("Union"), hereby submits this Post-Hearing Brief concerning the post-election objections filed by the Union in case 32-RD-213130, over conduct by the employer, Dycora Transitional Health - Fresno ("Employer") during the critical period. An election was conducted by the Board on May 31, 2018. As discussed below and set forth in the record, the Employer, by and through its agents, engaged in conduct that objectively interfered with the employees' exercise of free choice.

The evidence in the record shows that the Employer's acts tended to interfere with the employees' freedom of choice. Accordingly, the Board should uphold the Union's objections, set aside the election, and direct a new election.

II. PROCEDURAL HISTORY

The petition for an election in this matter was filed on January 17, 2018. The Board conducted an election on May 31, 2018 pursuant to a Stipulated Election Agreement. The final Tally of Ballots shows that out of 183 eligible voters, there were 116 valid votes casted, with 42 in favor of Union representation and 74 against continued representation. The Union then timely filed eleven objections, out of which seven were scheduled for hearing by the Regional Director.

The seven Objections set for hearing were:

Objection No. 4: The Employer and its agents promised or implied benefits to eligible voters if the Union lost the election.

Objection No. 5: The Employer and its agents solicited grievances and made an implied promise to remedy them.

Objection No. 6: The Employer and its agents questioned and polled employees regarding their support for the Union during the critical period.

Objection No. 8: The Employer and its agents changed terms and conditions of employment of eligible voters during the critical period.[1]

Objection No. 9: The Employer discriminatorily applied an unlawful solicitation rule during the critical period by allowing Petitioner's supporters and/or managers, supervisors and agents of Dycora to engage in solicitation while on working time and in patient care areas, allowing them to wear anti-union buttons/stickers, while maintaining that a non-solicitation policy that prohibited eligible voters from wearing pro-union stickers.

Objection No. 10: The Employer and its agents provided unlawful aid and assistance to the Petitioner and/or supporters of the Petitioner, including by allowing them to use the

[1] Objection 8 is covered by the Complaint issued against the Employer in NLRB Case 32-CA-215700. The Union is separately joining the General Counsel's post-hearing brief in Case 32-CA-215700.

employer's bulletin board to solicit and distribute literature but prohibiting the Union from doing the same.

Objection No. 11: The Employer, during the critical period, maintained unlawfully overbroad rules which interfered with employee free choice and destroyed laboratory conditions for a fair election.

III. ARGUMENT

The credible evidence in the record shows the Employer's acts tended to interfere with the employees' freedom of choice, and a result the Board should uphold the Union's objections, set aside the election, and direct a new election. (See *Jurys Boston Hotel*, 356 NLRB No. 114 (2011); *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002).)

A. STANDARD FOR ELECTION OBJECTIONS

There is no dispute that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000) (citation omitted). It is also well settled that as a general matter, the burden of proof on parties seeking to have a board-supervised election set aside is a "heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (citation omitted).

To meet this burden, the party attacking the results of an election must present facts that raise a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014) (citation omitted). The party objecting to the election has to present "specific evidence that there has been prejudice to the election." *Affiliated Computer Services, Inc.*, 355 NLRB No. 163 (2010) (citation omitted).

In evaluating whether to set aside an election, the Board applies an objective test. In particular, the question is whether the conduct by the offending party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). In other words, the question is not whether a party's conduct in fact interfered with free choice, but rather whether the party's misconduct tended to interfere with the

employees' right to make a free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984).

In determining whether the conduct has the tendency to interfere with the employees' freedom of choice, the Board considers: 1) the number of incidents; 2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; 3) the number of employees in the bargaining unit subjected to the misconduct; 4) the proximity of the misconduct to the election; 5) the degree to which the misconduct persists on the minds of the bargaining unit employees; 6) the extent of dissemination of the misconduct among the bargaining unit employees; 7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; 8) the closeness of the final vote; and, 9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004).

Preelection conduct that is an unfair labor practice is a *fortiori* conduct that improperly interferes with the election process, "unless it is so de minimis that it is 'virtually impossible to conclude that [the violation] could have affected the results of the election." *Airstream, Inc.*, 304 NLRB 151, 152 (1991), *enforced*, 963 F.3d 373 (6th Cir. 1992) (quoting *Enola Super Thrift*, 233 NLRB 409, 409 (1977). Additionally, "[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice . . ." under Section 8(a)(1). *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

B. OBJECTION 4: THE EMPLOYER'S PROMISES TO EMPLOYEES THAT THEY WILL GET RAISES AND OTHER BENEFITS WITHOUT THE UNION, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

Promises of benefits are objectionable. *NLRB v. Gisel Packing Co.*, 395 U.S. 575, 616-618 (1969); *General Shoe Corp.*, 77 NLRB 124 (1948). Implied promises are also sufficient to set aside an election. *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979). Even statements of historical facts and comparisons can be found to be implied promises of benefits "depending on their precise contents and context." *G & K Services*, 357 NLRB 1314, 1315 (2011); *see also*

Grede Plastics, 219 NLRB 592, 593 (1975) (a factually accurate letter contained implied promise).

Here, the evidence in the record contains clear facts that during the critical period the Employer made a number of expressed and/or implied promises to eligible voters that if the Union were to be decertified the employees would be rewarded with benefits. The Employer's own witness, Petitioner Rosalinda Lorona, testified about the employer's expressed promises. And the rebuttal testimony from the Employer's witness, Julianne Williams, also corroborated the testimony that the Employer made a number of implied promises.

1. <u>The Employer made an implied promise that employees would get more gift cards if they voted against the Union</u>

Eligible voter Victor Gonzalez, an employee in the Dietary Department, testified about his conversation regarding the election with the Employer's Dietician, Elizabeth.[2] Gonzalez specifically noted a conversation in which the Dietician expressed that without the Union the Employer "would be able to do more fun activities" for the employees, such as giving them gift cards. (Tr. 64-65) This exchange occurred on a day in which the Dietician "came into the kitchen to see who was wearing sports attire" as part of a "sports day" game announced and hosted by the Employer. (Tr. 65-66)

The fact that the Employer did not call any witness to rebut any of these facts is telling.

2. <u>The Employer implied that eligible voters could get a 2% wage increase by voting out the Union</u>

Gonzalez also testified that on the Employer's bulletin Board there was flyer inventing eligible voters to see management about records showing which employees were not paying dues and comparing a 2% wage increase to the annual union dues paid by full-time employees. (Tr. 79-82 & Union Exhibit 1-A) There is no evidence in the record that a 2% wage increase was offered in bargaining. But in addition, the issue of wage increases was important because during the critical period the Union had a grievance pending over 2017 wage increases that the

[2] The Employer's Dietician is still employed by the Employer but the Employer did not call her as a witness to rebut Gonzalez's testimony.

Union was pursuing on behalf of eligible voters. (Tr. 170 & UXs 3-A to 3-C) The Union's grievance had not been resolved as of the date of the Board election on May 31, 2018. (Tr. 177) In fact, the Union moved the grievance to arbitration on May 22, 2018. (Tr. 178-179 & UX 4) The grievance over those 2017 wage increases was not resolved until a settlement agreement was signed in July 2018. (Tr. 180)

Without any evidence in the record that the Employer and the Union were in agreement about a 2% wage increase, the implication in the Employer's flyer that employees are going to get a 2% wage increase was objectionable conduct. The flyer could also be reasonably interpreted by employees to be a promise by the Employer to pay the 2% wage increase that the Union was pursuing through the grievance, which the Employer had consistently disagreed with and was an issue of contention during the critical period.

3. <u>The Employer gave assurances that employees would not lose sick or vacation hours, and that they would receive their back pay for the 2017 wage increases pursued in the Union's grievance, if they voted against the Union</u>

Eligible voter Maria Hernandez, a nine year employer, testified about a meeting the Employer held at the facility the same week of the election. (Tr. 193-194) The meeting, which was attended by eligible voters and supervisors/managers in the facility, also included the Employer's owner, Julianne Williams. (Tr. 194-195) During the meeting, a female employee asked whether sick hours would be lost if the employees started new without the Union and Williams responded no. (Tr. 196-200) Another female employee then asked whether vacation hours would be lost and "Williams said no, everything would be the same." (Tr. 200)[3]

Hernandez also testified about a promise the Employer made to pay the 2017 wage increase that was the subject of the Union's pending grievance. During the all staff meeting the Employer held the week of the election, Hernandez asked whether the CNAs who had not gotten a raise would be getting retroactive pay and Williams responded that she could not respond at that time. (Tr. 200-201) But the day after the meeting, Hernandez was approached by the

[3] Any argument by the Employer that Williams was allowed to make these promises because she was simply responding to questions should be rejected. *California Gas Transport*, 347 NLRB 1314, 1318 (2006).

Employer's Assistant Administrator, Felicia,[4] and was told by the Assistant Administrator "that they were going to - - the CNAs - - the workers that didn't get their retro pay or their back pay that they were going to get their back pay." (Tr. 202-204)[5]

The Employer also posted and distributed a letter dated May 29, 2018 from Julianne Williams to eligible voters wherein Williams promised that "if the union were to be voted out" the employees "will not be denied your back pay for raises given in 2017." (Tr. 203-204 & UX 6) In addition, Williams provided assurances in the letter that if employees "choose to deal directly" with the Employer they would not lose, among other things, vacation or other benefits. (UX 6)

4. <u>The Employer promised that employees could be paid more without the Union</u>

Union External Organizer Ignacio Cortez testified about an interaction he had with the Employer's Dietary Manager, Raymond Gonzalez, about a week before the election in the break room and in the presence of several employees. The employees, who worked in the kitchen, were having their lunch and celebrating a birthday. (Tr. 238-240) While Cortez and one of the employees were having a conversation, Manager Gonzalez interjected and said that if the employees were not in the Union then he would be able to give them more money. (Tr. 241-242) Cortez then engaged in a discussion with Manager Gonzalez to understand the basis for the statement during which Gonzalez explained that the Union's contract prohibited him from paying the employees more. (Tr. 242-243)

5. <u>The Employer's witnesses admitted that Williams made promises to eligible voters</u>

The Employer called the Petitioner, Rosalinda Lorano, as a witness. Lorano testified that Julianne Williams attended an all staff meeting on a Thursday before the election (the election was held on Thursday May 31, 2018), during which Williams told all employees present "that if

[4] The hearing transcript states "Felicia" but the record shows that the Assistant Administrator's full name is "Phylicia Smith." (UX 6)

[5] The Assistant Administrator was not called as a rebuttal witness by the Employer.

the Union was no longer part of our facility, that don't meant that we're going to all automatically get raises or any kind of anything until it's all settled - - it was basically like she'll go back and try to catch us up to our pay." (Tr. 394-395)

Lorano also testified that an employee asked if they are going to get raises, and Williams responded:

> yes, that they will be coming, but not all at once. They're going to have to look at, you know, the service. Like I've been there for eight years and I should be brought to my pay where I should be at compared to other facilities that are not union. And but she said, like, that's not going to happen overnight. It's going to take some time, but eventually everybody will start getting, you know, raises as we're supposed to. You know, with our evaluations as most companies do.

(Tr. 396) Williams also assured employees that "your vacation time will stay the same and your sick time, it's California law." (Tr. 398) Further in her testimony, Lorano noted that employees specifically wanted to know from Williams whether they were going to get raises after the election to be brought up to par with employees at other facilities and that Williams responded that:

> they would have to look into it and bring us up, you know, the ones who need to be brought up, be brought up, but not everybody can because they can't afford that. Obviously, that's too many of us. So that's what she told us.

(Tr. 406-408) Williams also told Employer that Williams was asked whether the Employer would be reinstating the practice of "yearly evaluations and little raises with those" and Williams responded "that most likely will be happening." (Tr. 408)[6]

C. OBJECTION NO. 5: THE EMPLOYER'S SOLICITATION OF GRIEVANCES AND IMPLIED PROMISE TO REMEDY THEM, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

An employer's expressed or implied promise to address employee grievances "impresses

[6] On the third day of hearing, the Employer called Williams to essentially rebut Lorano's testimony from the previous afternoon. Williams's efforts to rebut what employees Hernandez and Lorano testified about should be rejected. There is no credible evidence in the record that Williams went to the meeting to address "rumors."

upon employees the notion that union representation is unnecessary." *Johnson Technology, Inc.*, 345 NLRB 762, 764 (2005)

Here, the Employer's witness, Lorano, testified that at an all staff meeting before the election the Employer's owner, Julianne Williams, told employees present that she "would not hold any grudges if [they] voted yes to keep the Union" but invited them to "ask her any questions" and said that "she has an open door policy which, you know, at any moment any of us could go into their office or give her a phone call, and she will answer anything to the best of her knowledge." (Tr. 397-398) In addition, in the letter dated May 29, 2018, from Williams that was posted and distributed in the facility, Williams directed employees to the "Assistant Administrator Phylicia Smith or Vice President of Operations Kristine Williams" for any questions regarding the election. (UX 6)

There is no evidence in the record that the Employer had a past practice of soliciting concerns from employees in a like manner before the critical period. In this context of the meeting and the letter, the Employer was assuring employees that they would be in the same position "should you choose to deal directly with Dycora." (UX 6) This implied promise to address employee grievances was objectionable conduct that supports ordering a new election.

D. OBJECTION NO. 6: THE EMPLOYER'S POLLING OF EMPLOYEES REGARDING THEIR SUPPORT FOR THE UNION, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

It is unlawful for employers to distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union." *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1818 (2011), *quoting Circuit City Stores*, 324 NLRB 147 (1997).

Here, eligible voter Gonzalez testified that the Employer had its agents "walking around with candy bars and then buttons" to ask eligible voters to vote against the Union. (Tr. 68 & 75-78) Although Gonzalez did not know the name of the individual who approached him with the candy, Gonzalez testified without rebuttal that he was approached and offered the candy while he was on duty in the Employer's kitchen.

In addition, the Employer hosted a barbeque at the facility during which a non-bargaining unit employee from the Employer's administrative staff who was wearing "business appropriate clothes"[7] put a "Vote No" button on Gonzalez's shirt after he had told her that he did not want it and had been questioned why he did not want it. (Tr. 68-70) Gonzalez's co-workers told him that the "anti-union barbeque" was happening, and although he was pro-union and knew he would have to hear "anti-union stuff" at the barbeque, he went for the food that the Employer used to entice attendance. (Tr. 71-73) At the barbeque, the Employer had Dietary Manager Raymond Gonzalez working the barbeque and "three of four other individuals there that was handing out the food and…handing out the buttons and just talking to you." (Tr. 74)

Finally, eligible voter Hernandez testified that the Assistant Administrator approached her while she was at the nurses' station and offered candy. (Tr. 205) The candy was in a box that the Assistant Administrator was carrying and after being offered one, Hernandez took one from the box and said thank you. (Tr. 206) Before Hernandez opened the candy, the Assistant Administrator said to wait and "read what it says in the back." (Tr. 206) On the back side of the candy, the Employer had put a sticker that said "Vote No" on it. (Tr. 206)

E. OBJECTION NO. 8: THE EMPLOYER'S UNILATERAL CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT FOR THE EMPLOYEES IN THE DIETARY DEPARTMENT, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

As noted above, Union is joining and incorporating by reference the General Counsel's brief in NLRB Case 32-CA-215700, a case which parallels the Union's objection here. The Union's position is that the unlawful unilateral changes at issue in that case, on their own, interfered with the election and is sufficient basis to order a new election. *See, e.g., Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (19630 ("conduct of this nature which is violative of Section 8(a)(1) is, a *fortiori*, conduct which interferes with the exercise of a free and untrammeled choice

[7] Maria Hernandez testified that the Employer's staff who work in the offices in the facility include (1) Personnel Department staff who are in charge of scheduling, (2) the Activities Director and her assistants, and (3) the Employer's Administrator Ken Evans and the Assistant Administrator Felicia, (4) Medical Records Department staff, and (5) Business Office staff. (Tr. 191-193). There is no evidence in the record that bargaining unit employees work in the offices and/or wear business casual attire to work.

in an election."); *see also Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962).

F. OBJECTION NO. 9: THE EMPLOYER DISCRIMINATORY APPLICATION AND MAINTENANCE OF A NO-SOLICITATION RULE, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

The Board has noted that "discrimination means the unequal treatment of equals." *Register Guard*, 351 NLRB 1110, 1117 (2007). In addition, that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id.* at 1118.

Here, as noted above, both Gonzalez and Hernandez testified, without rebuttal, that anti-union supporters were soliciting employees in the facility by handing out "vote no" buttons and candy bars. In addition, Cortez testified that he saw employees, such as the Petitioner and receptionist Cassie Mendoza, wearing anti-union buttons in the facility when they were coming and going to the break room. (Tr. 234-236)

In contrast to these employees wearing such "vote no" stickers/buttons for solicitation purposes while on work time and in patient care areas, the Employer maintains a rule in its employee handbook which states that "Solicitation and/or distribution of literature by one employee to another employee is prohibited while either person is on working time or in immediate patient care areas." *See* Respondent Exhibit 4, pg. 33 ["Solicitation and/or Distribution of Literature]; see also Union Exhibit 2-B, pg. 31 [same rule])

By maintaining a rule that prohibits pro-union solicitation, but allowing anti-union employees to solicit during the critical period, the Employer interfered with laboratory conditions that were necessary for a free and fair election.

G. OBJECTION NO. 10: THE EMPLOYER'S ASSISTANCE TO THE PETITIONER BY ALLOWING USE OF THE EMPLOYER'S BULLETIN BOARD FOR SOLICITATION AND DISTRIBUTION OF ANTI-UNION MATERIALS, ON ITS OWN, WARRANTS SETTING ASIDE THE ELECTION

Here, Cortez testified that he saw anti-union materials posted on the Employer's bulletin board and on the refrigerator inside the employee break room. (Tr. 231-232) The Union was allowed to post its materials only on the Union's bulletin board. (Tr. 232) Cortez saw that the

anti-union material on the Employer's bulletin board was posted by a receptionist named Cassie Mendoza rather than by management. (Tr. 233 & 236)

Before and during the critical period, the Employer maintained a rule in its employee handbook which states that "Bulletin boards are used by management to communicate information about wage and hour laws, equal employment opportunity, health and safety, company policies, business announcements and all other official communications that affect this center or your job….To avoid confusion, employees may not tape, post, tack or affix in any other way any literature, printed or written materials, photographs or personal notices on company bulletin boards, on the walls or elsewhere on company property." *See* Respondent Exhibit 4, pg. 33 ["Solicitation and/or Distribution of Literature]; see also Union Exhibit 2-B, pg. 31 [same rule])

By maintaining a rule that prohibits use of the employer bulletin board, but allowing anti-union employees to use the employer's bulletin board during the critical period, the Employer interfered with laboratory conditions that were necessary for a free and fair election.

H. OBJECTION NO. 11: THE EMPLOYER'S MAINTENANCE OF AN UNLAWFULLY OVERBROAD RULE WARRANTS SETTING ASIDE THE ELECTION

During the critical period, the Employer maintained an unlawful "Computer Use, E-Mail, Voice Mail, and the Internet" rule in its employee handbook. The unlawful handbook rule is another reason to warrant a new election. *Jurys Boston Hotel*, 356 NLRB 927 (2011)

Here, Jim Philliou, the Union's Chief Negotiator, identified the Employee Handbook that the Employer provided to the Union at the outset of negotiations between the parties. (Tr. 164-168 & UX 2-B) The Employer's witness, Keri Oviedo, testified that the hand book she instructed the facility Administrator to distribute to employees in the bargaining unit was a later version. (Tr. 355-356; see also Respondent Exhibit 4) The rule at issue is the same in both versions in the record. The rule provides as follows:

> "The computer and telephone systems are important assets and have been installed to facilitate business communication. Although you may be able to use codes to restrict access to information left

> on the systems, it must be remembered that these systems are intended solely for business use…. Some positions may be authorized to have Internet access for business reasons. Internet use must be reserved for business purposes only."

The rule is unlawfully overbroad because it prohibits employees from using computers and the Internet access for any reason other than "business purposes" and therefore it interferes with employees' use of the computer and Internet to engage in conduct protected by Section 7 while off-duty.

IV. CONCLUSION

The record here supports each and every one of the Union's Objections to the election. Any one of these Objections is sufficient to overturn the election results here. For these reasons, the Union urges that order for a new election be issued.

Dated: October 4, 2018

WEINBERG, ROGER & ROSENFELD
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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On October 4, 2018, I served the following documents in the manner described below:

UNION'S POST-HEARING BRIEF REGARDING OBJECTIONS TO THE ELECTION

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 4, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler